

# Missouri Law Review

---

Volume 85 | Issue 4

Article 11

---

Fall 2020

## No Holds Barred: The Use of Restrictive Behavioral Intervention in Missouri Public Schools

Claire Hawley

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Claire Hawley, *No Holds Barred: The Use of Restrictive Behavioral Intervention in Missouri Public Schools*, 85 Mo. L. Rev. (2020)

Available at: <https://scholarship.law.missouri.edu/mlr/vol85/iss4/11>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact [bassettcw@missouri.edu](mailto:bassettcw@missouri.edu).

## NOTE

### **No Holds Barred: The Use of Restrictive Behavioral Intervention in Missouri Public Schools**

*State ex rel. Alsup v. Kanatzar*, 588 S.W.3d 187 (Mo. 2019) (en banc).

Claire Hawley\*

#### I. INTRODUCTION

While students in public school still retain certain constitutional rights, these rights are not coextensive to those of adults in other settings.<sup>1</sup> This is largely due to the traditional deference in American jurisprudence to school officials on decisions of student discipline.<sup>2</sup> This deference is generally

---

\*B.A., University of Chicago, 2017; J.D. Candidate, University of Missouri School of Law, 2021; Associate Member, *Missouri Law Review*, 2019-2020; Senior Lead Articles Editor, *Missouri Law Review*, 2020-2021. I am grateful to Professor Alexander for her insight, guidance, and support during the writing of this Note, as well as the *Missouri Law Review* for its help in the editing process. I am also especially thankful to my parents, Doug and Kim Hawley, and Dr. Jacob Young for their extensive and unwavering support.

1. See *infra* note 44; see also *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns).

2. The common law view of the legal status of students is embodied by the doctrine of *in loco parentis*. In 1769, Sir William Blackstone articulated the doctrine as follows: “[A] parent may . . . delegate part of his [or her] parental authority . . . to the tutor or schoolmaster of his [or her] child; who is then in *loco parentis*, and has such a portion of the power of the parent committed to his charge, . . . that of restraint and correction, as may be necessary to answer the purposes for which he is employed.” Todd A. DeMitchell, *The Duty to Protect: Blackstone’s Doctrine of In Loco Parentis: A Lens for Viewing the Sexual Abuse of Students*, 2002 BYU EDUC. & L. J. 17, 18–19 (2002). Effectively, “[s]chools assume custody of students while they are deprived of the protection of their parents while attending school.” *Id.* at 19; see also Kathryn R. Urbonya, *Determining Reasonableness Under the Fourth Amendment: Physical Force to Control and Punish Students*, 10 CORNELL J. L. & PUB. POL’Y 397, 452 (2001)

understood to reflect the uniquely difficult nature of student discipline, which involves the delicate balancing of students' constitutional right to a public education with their right to a safe learning environment.<sup>3</sup>

One area in which school officials are afforded discretion is in the physical restraint of students.<sup>4</sup> For the purposes of this Note, physical restraint is defined as "the use of person-to-person physical contact to restrict the free movement of all or a portion of a student's body."<sup>5</sup> While physical restraint is conceptually similar to seclusion and corporal punishment, there are critical distinctions.<sup>6</sup> When a school official physically restrains a student, s/he is using force for the purposes of controlling a disruptive student who poses an imminent threat to his or her own safety or the safety of others.<sup>7</sup> In doing so,

---

("When children enter the public schools, they leave their parents behind and experience a unique context, one controlled by state officials. At school, these officials have temporary custody of students to further their primary goal—education.").

3. See generally Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 59–60 (1996).

4. *Id.* at 63.

5. This is the definition used by the Missouri Department of Elementary and Secondary Education's "Model Policy." MO. DEP'T OF ELEMENTARY & SECONDARY EDUC., EDUCATION MODEL POLICY ON SECLUSION AND RESTRAINT (2020), [https://dese.mo.gov/sites/default/files/se\\_compliance\\_model\\_policy\\_seclusion\\_and\\_restraint\\_july\\_2020.pdf](https://dese.mo.gov/sites/default/files/se_compliance_model_policy_seclusion_and_restraint_july_2020.pdf) [https://perma.cc/3RL3-GETX]. "It does not include briefly holding a student without undo force for instructional or other purposes, briefly holding a student to calm them, taking a student's hand to transport them for safety purposes, physical escort or intervening in a fight." *Id.*

6. Restraint is generally defined as "the use of physical force, with or without the use of any physical device or material, to restrict the free movement of all or a portion of a student's body." H.B. 1568(1), 100th Gen. Assemb. Reg. Sess. 2 (Mo. 2020) <https://house.mo.gov/billtracking/bills201/hlrbillspdf/4155H.01I.pdf> [https://perma.cc/RKY9-KULQ]. Seclusion, on the other hand, involves placing a student under involuntary, solitary confinement in a physical area in which the student is physically prevented from leaving. H.B. 1568(2), 100th Gen. Assemb. Reg. Sess. 2 (Mo. 2020). Corporal punishment is similar to physical restraint insofar as school officials use force against students; however, corporal punishment involves the use of force to discipline while restraint generally involves the use of force to control a disruptive student who poses an imminent threat to their safety or the safety of others. American Academy of Child & Adolescent Psychiatry, *Corporal Punishment in Schools*, (September 2014), [https://www.aacap.org/aacap/policy\\_statements/1988/corporal\\_punishment\\_in\\_schools.aspx](https://www.aacap.org/aacap/policy_statements/1988/corporal_punishment_in_schools.aspx).

7. U.S. DEP'T OF EDUC., RESTRAINT AND SECLUSION: RESOURCE DOCUMENT 2 (2012), <https://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf> [https://perma.cc/U6ND-MECY].

school officials are required to balance the student's right to education and due process with the safety of others.<sup>8</sup> Missouri school officials are left with little guidance from the federal and state governments when making these complex, and often split-second, decisions.<sup>9</sup> The Missouri Department of Elementary and Secondary Education ("MODESE") provides a Model Policy, but it is non-binding upon local school boards.<sup>10</sup> Local school boards have the authority to create their own policy for the use of physical restraints.<sup>11</sup> The lack of reporting requirements limits the collection of data on the use of physical restraint in Missouri public schools, but the most recent federal data from the 2015-16 school year show that 59,217 students were restrained nationwide and at least 1990 in Missouri.<sup>12</sup> The data also demonstrate that

---

8. *See id.*

9. Jessica Butler, *How Safe is the Schoolhouse? An Analysis of State Seclusion and Restraint Laws and Policies*, at 14, 131 (2019), <https://www.aapd.com/wp-content/uploads/2016/03/seclusion-and-restraints.pdf> [<https://perma.cc/G66Y-J9LM>].

10. *Id.*

11. While the vast majority of Missouri's local school boards have adopted policies that allow for a broader employment of physical restraint, local school boards could theoretically prohibit physical restraint except in the most extreme circumstances. *See* MO. REV. STAT. § 160.263(2) (2018). The wisdom of such policies have been called into question by many leading education policy experts, who argue that physical restraint often escalates defiant or dangerous behavior, rather than reduce it. *See, e.g., Classrooms in Crisis: Examining the Inappropriate Use of Seclusion and Restraint Practices: Hearing Before the Subcomm. on Early Childhood, Elementary, and Secondary Education of the H. Comm. on Educ. & the Workforce*, 116th Cong. 3 (2019) <https://edlabor.house.gov/imo/media/doc/SugaiTestimony022719.pdf> [<https://perma.cc/A44N-JQBG>] (statement of George Sugai, Ph.D., Neag School of Education, University of Connecticut); *Beyond Seclusion and Restraint: Creating Positive Learning Environments for All Students: Hearing Before the Sen. Comm. on Health, Educ., Labor, & Pensions*, 112th Cong. 2 (2012) <https://www.help.senate.gov/imo/media/doc/Crimmins.pdf> [<https://perma.cc/HNS4-DDTP>] (statement of Daniel Crimmins, Ph.D., Director, Center for Leadership in Disability).

12. U.S. DEP'T OF EDUC., 2015-16 STATE AND NATIONAL ESTIMATIONS, [https://ocrdata.ed.gov/StateNationalEstimations/Estimations\\_2015\\_16](https://ocrdata.ed.gov/StateNationalEstimations/Estimations_2015_16) [<https://perma.cc/R88V-6ZCG>]. The use of physical restraint in Missouri public schools increased only slightly from the 2013-14 school year, in which 1,932 students were restrained. U.S. DEP'T OF EDUC., CIVIL RIGHTS DATA COLLECTION, 2013-2014, <https://catalog.data.gov/dataset/civil-rights-data-collection-2013-14> [<https://perma.cc/37YE-SUKY>]. There are ongoing concerns that the use of physical restraints are underreported, especially in large school districts. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-551R, K-12 EDUCATION: EDUCATION SHOULD TAKE IMMEDIATE ACTION TO ADDRESS INACCURACIES IN FEDERAL RESTRAINT AND INCLUSION DATA (2019); Joseph Shapiro, *National Data Confirm Cases of Restraint and Seclusion in Public Schools*, NPR (June 18,

physical restraint is employed inequitably and has a disparate impact on students with disabilities and students of color.<sup>13</sup>

Part II of this Note discusses the facts and holding of *State ex rel. Alsup v. Kanatzar*, which upheld official immunity for a school official who broke a student's arm while attempting to physically restrain the student.<sup>14</sup> Part III provides legal context for the *Kanatzar* decision, including the federal government's limited but significant role in school discipline and Missouri's localized and deferential approach to disciplinary issues. Part IV offers an in-depth discussion of the arguments advanced in *State ex rel. Alsup v. Kanatzar*, the court's reasoning, and its ultimate conclusion that the school official was entitled to official immunity. Finally, Part V addresses the response to *Kanatzar*, highlighting recent legislative proposals to change legal framework for school discipline in Missouri. Part V concludes with policy recommendations aimed at strengthening protections for Missouri students and limiting the use of physical restraints in public schools.

## II. FACTS AND HOLDING

The most recent Supreme Court of Missouri case involving the physical restraint of a student, *State ex rel. Alsup v. Kanatzar*, expanded the official immunity of public school employees for negligence in the employment of physical restraints.<sup>15</sup> This case arose after Israel Mariano, a student at Independence Academy, an alternative school in the Independence School District, brought a negligence action against Carlos Alsup, an in-school suspension teacher, in the teacher's individual capacity.<sup>16</sup> Mariano alleged he sustained a broken arm after Alsup attempted to place him in a physical restraint.<sup>17</sup>

On the morning of April 28, 2016, Mariano refused to go to school and failed to get on his school bus.<sup>18</sup> Mariano's mother drove him to school

---

2014), <https://www.npr.org/2014/06/19/322915388/national-data-confirms-cases-of-restraint-and-seclusion-in-public-schools> [https://perma.cc/98MN-VL36].

13. Data from the 2015-16 school year shows that students of color and students with disabilities are disproportionately subjected to physical restraints. U.S. DEP'T OF EDUC., 2015-16 STATE AND NATIONAL ESTIMATIONS, [https://ocrdata.ed.gov/StateNationalEstimations/Estimations\\_2015\\_16](https://ocrdata.ed.gov/StateNationalEstimations/Estimations_2015_16) [https://perma.cc/R88V-6ZCG]. Nationally, students who identified as Black or African American made up 15.4% of all students enrolled in public schools and 27.4% of students who were restrained. *Id.* In the same school year, students with disabilities comprised only 12.6% of the nationwide school enrollment but accounted for 75.9% of students who were restrained. *Id.*

14. 588 S.W.3d 187 (Mo. 2019) (en banc).

15. *Id.*

16. *Id.* at 189.

17. *Id.*

18. *Id.*

herself, calling ahead to Independence Academy to inform them of the situation.<sup>19</sup> When they arrived at Independence Academy, a physical struggle ensued between Mariano and his mother.<sup>20</sup> After Mariano's mother brought him inside the school, Alsup and another staff member "took hold of him."<sup>21</sup> In the course of physically restraining him, Alsup broke Mariano's arm.<sup>22</sup>

In compliance with state law requiring all local school boards to adopt a written policy for restrictive behavioral interventions,<sup>23</sup> the Independence School District had an established disciplinary policy known as District Board Policy 2770 ("Policy 2770").<sup>24</sup> Both parties agreed that Policy 2770 fulfills the statutory requirements of Missouri Revised Statute Section 160.263.<sup>25</sup> Under Policy 2770, the Independence School District requires its employees to undergo training from the Crisis Prevention Institute ("CPI"), which "provides training for multiple methods of physically restraining a student."<sup>26</sup> Alsup attended the CPI training program.<sup>27</sup>

Mariano sued Alsup in the Circuit Court of Jackson County,<sup>28</sup> alleging Alsup was negligent in physically restraining Mariano and therefore liable for his injuries.<sup>29</sup> Alsup filed two motions to dismiss, both of which were overruled.<sup>30</sup> Alsup later filed a motion for summary judgment, arguing he was entitled to official immunity.<sup>31</sup> On August 30, 2018, Judge James F. Kanatzar denied Alsup's motion for summary judgment because Alsup failed to

---

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* ("Pursuant to Policy 2770, an in-school suspension teacher is permitted to physically restrain students in three situations: (1) '[i]n an emergency situation;' (2) '[w]hen less restrictive measures [have] not effectively deescalated the situation;' and (3) when otherwise specified by various types of plans. Policy 2770 also provides physical restraint shall '[o]nly be used for as long as necessary to resolve the actual risk of danger or harm that warranted the physical restraint.' And the school personnel using physical restraint shall '[u]se no more than the degree of force necessary to protect the student or other persons from imminent physical harm.' Further, Policy 2770 permits the school personnel using physical restraint to only '[u]se methods of restraint in which the personnel has received district approved training.'").

23. MO. REV. STAT. § 160.263 (2018).

24. *Kanatzar*, 588 S.W.3d at 189.

25. *Id.* at 189 n.4.

26. *Id.* at 189–90.

27. *Id.* at 190.

28. Brief for the Respondent, State ex rel. Alsup v. Kanatzar, 588 S.W.3d 187 (Mo. 2019) (en banc) (No. SC97427) at 1, 6..

29. *Kanatzar*, 588 S.W.3d at 190.

30. *Id.*

31. *Id.*

demonstrate there were no genuine issues of material fact.<sup>32</sup> Alsup then sought a writ of prohibition from the Missouri Court of Appeals, Western District, which was denied.<sup>33</sup> On September 24, 2018, Alsup filed a writ of prohibition with the Supreme Court of Missouri, which was preliminarily issued on October 2, 2018.<sup>34</sup> The Supreme Court of Missouri then proceeded to hear arguments on the original remedial writ, with jurisdiction pursuant to Article V, Section 4.1 of the Missouri Constitution.<sup>35</sup>

The issue presented was “whether the physical restraint technique used by [Alsup] was a discretionary or ministerial act.”<sup>36</sup> Mariano argued that Alsup was not entitled to official immunity because of evidence proffered by Mariano’s expert witnesses that Alsup performed the restraint techniques improperly.<sup>37</sup> Mariano further argued that the manner in which restraint techniques are performed by school officials is not a discretionary act, but rather “a ministerial act which must be performed in a certain way, once the decision is made to physically restrain the student.”<sup>38</sup> Judge Paul C. Wilson, writing for a unanimous majority, held that Alsup was entitled to official immunity because a teacher’s duty to physically restrain a student in compliance with the school district’s written policy was not a ministerial duty.<sup>39</sup>

### III. LEGAL BACKGROUND

The United States Constitution is silent as to the federal government’s duty to educate its citizens, thus public education in the United States has traditionally been left to the state and local governments.<sup>40</sup> However, the federal government does play a limited role in education policy through the United States Department of Education (“DoEd”), Congress, and the federal judiciary.<sup>41</sup> Subpart A provides an overview of federal law as well as actions taken by the federal government regarding student discipline, with a specific focus on the use of physical restraints in public schools. Subpart B

---

32. Brief for Respondent, *supra* note 28, at 5; *see also* Respondent’s Order, A001-002, as cited in Respondent’s Brief in Opposition to Prohibition.

33. Brief for Respondent, *supra* note 29, at 5; *see also* Order from Western District Court of Appeals, A003-004.

34. Brief for Respondent, *supra* note 29, at 5.

35. *Id.*

36. *Id.* at 6.

37. *See* Plaintiff’s Suggestions in Opposition to Defendant’s Motion for Summary Judgment, A012-015 [<https://perma.cc/W7TV-J5DL>].

38. Brief for Respondent, *supra* note 29, at 6.

39. State ex rel. Alsup v. Kanatzar, 588 S.W.3d 187, 194 (Mo. 2019) (en banc).

40. U.S. DEP’T OF EDUC., THE FEDERAL ROLE IN EDUCATION (2017), <http://www2.ed.gov/about/overview/fed/role.html> [<https://perma.cc/DW7X-9YQD>].

41. *Id.*

encapsulates the relevant actions taken by the Missouri legislature and state educational agency leading up to *State ex rel. Alsup v. Kanatzar*.

### *A. The Federal Government's Role in Education*

During the 1970s, the United States Supreme Court ruled in a number of seminal cases on school discipline and due process.<sup>42</sup> Taken together, these cases stand for the principle that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings, and the rights of students must be applied in light of the special characteristics of a school environment.<sup>43</sup> These cases and their underlying legal principles are necessary to understand the current state of the law regarding the use of physical force against students in public schools.

First, in *Goss v. Lopez*, the Supreme Court held that students facing temporary suspension are afforded sufficient due process if they are provided with an opportunity to have an informal hearing with school administrators before such suspensions.<sup>44</sup> Then, in *Horowitz v. Board of Curators, University of Missouri*, the Supreme Court considered whether a public university student is constitutionally entitled to a hearing prior to dismissal from school for academic reasons.<sup>45</sup> Ruling against a former medical student, the Court concluded that “the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.”<sup>46</sup>

While these cases show that the constitutional rights of public school students differ significantly from that of adults in non-educational settings, only one directly addressed the use of physical restraint against students: In

---

42. See, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975); *Bd. of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78 (1978); *Ingraham v. Wright*, 430 U.S. 651 (1977).

43. According to the majority in *Goss*, “[Y]oung people do not ‘shed their constitutional rights’ at the schoolhouse door.” *Goss*, 419 U.S. at 574 (1975) (quoting *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969)). While this is certainly true, Justice Powell’s dissent reveals the underlying nuances. First, Justice Powell points out “the unique nature of public education and the correspondingly limited role of the judiciary in its supervision,” which was recognized by the *Tinker* Court: “Until today, and except in the special context of the First Amendment issue in *Tinker*, the educational rights of children and teenagers in the elementary and secondary schools have not been analogized to the rights of adults or to those accorded college students. Even with respect to the First Amendment, the rights of children have not been regarded as ‘co-extensive with those of adults.’” *Goss*, 419 U.S. at 591 (quoting *Tinker*, 393 U.S. at 515 (Stewart, J., concurring)).

44. *Goss*, 419 U.S. at 581.

45. *Bd. of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 80 (1978).

46. *Id.* at 78.



*Ingraham v. Wright*, the Supreme Court considered whether a hearing is required before a student can be subjected to corporal punishment by school officials.<sup>47</sup> The fourteen-year-old plaintiff, Leo Ingraham, was forcibly restrained and paddled by a school administrator for allegedly failing to leave the stage of the school auditorium when asked.<sup>48</sup> Ingraham sought medical treatment for a hematoma caused by the paddling.<sup>49</sup> By and through his parents, Ingraham sued, alleging a violation of his Eighth Amendment rights to be free from “cruel and unusual punishment.”<sup>50</sup> The Supreme Court disagreed, ruling that the corporal punishment of students could not be considered cruel and unusual under the Eighth Amendment.<sup>51</sup> Moreover, corporal punishment is lawful regardless of whether the student is provided notice or the opportunity for a prior hearing.<sup>52</sup>

Aside from the judiciary, the federal executive and legislature also play a limited role in education law. Since it became an official cabinet-level agency in 1979,<sup>53</sup> the DoEd traditionally served as a support mechanism for public schools in a data-gathering and information-dissemination capacity.<sup>54</sup> However, funding from DoEd comprises only about eight percent of the overall funding received by public elementary and secondary schools.<sup>55</sup> Nevertheless, the DoEd continues to “play a leadership role in the ongoing national dialogue over how to improve the results of our education system for all students.”<sup>56</sup> To that end, the DoEd has actively cultivated a discussion about school discipline.<sup>57</sup>

---

47. *Ingraham v. Wright*, 430 U.S. 651, 653 (1977).

48. *Id.* at 657.

49. *Id.*

50. *Id.* at 653 n.1.

51. *Id.* at 683.

52. *Id.* at 682.

53. U.S. DEP’T OF EDUC., AN OVERVIEW OF THE U.S. DEPARTMENT OF EDUCATION (2010), <https://www2.ed.gov/about/overview/focus/what.html> [<https://perma.cc/T97H-M3ZM>].

54. Christie B. Carrino, *Gatekeepers to Success: Missouri’s Exclusionary Approach to School Discipline*, 52 WASH. U. J. L. & POL’Y 171, 174 (2016).

55. U.S. DEP’T OF EDUC., THE FEDERAL ROLE IN EDUCATION (2017), <http://www2.ed.gov/about/overview/fed/role.html> (“[T]he Federal contribution to elementary and secondary education is about 8 percent, which includes funds not only from the Department of Education (ED) but also from other Federal agencies, such as the department of Health and Human Services’ Head Start program and the Department of Agriculture’s School Lunch program.”).

56. *Id.*

57. “Restraint or seclusion should not be used as routine school safety measures; that is, they should not be implemented except in situations where a child’s behavior poses imminent danger of serious physical harm to self or others and not as a routine strategy implemented to address instructional problems or inappropriate behavior (e.g., disrespect, noncompliance, insubordination, out of seat), as a means of coercion or retaliation, or as a convenience.” U.S. DEP’T OF

Although the DoEd has a limited role in education compared to states and municipalities, Congress can enact federal education legislation pursuant to the Spending Clause of the Constitution.<sup>58</sup> Congress's spending power includes the ability to "attach conditions on the [states'] receipt of federal funds. . . 'to further broad policy objectives . . .'"<sup>59</sup> Notable examples of such legislation include the No Child Left Behind Act of 2001 ("NCLB"),<sup>60</sup> the National Defense Education Act of 1958 ("NDEA"),<sup>61</sup> and the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA").<sup>62</sup> Federal law currently protects children from restraint and seclusion in hospitals and other inpatient institutions.<sup>63</sup>

---

EDUC., *RESTRAINT AND SECLUSION: RESOURCE DOCUMENT 3* (2012), <https://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf> [<https://perma.cc/73KD-4FCV>].

58. See U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.").

59. *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980)). Most federal education legislation currently in effect was passed pursuant to the Dole framework, which provides the circumstances under which Congress may use its spending power: (1) it must be used in pursuit of the general welfare; (2) the condition must be unambiguous; (3) the condition should be related to federal interest in particular programs; and (4) there cannot be an independent constitutional bar to the conditioned grant. *Id.* at 207–08.

60. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.).

61. National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580 (codified as amended in scattered sections of 20 U.S.C.).

62. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. 108-446, 118 Stat. 2647 (codified as amended in scattered sections of 20 U.S.C.). In addition to these statutes, *Race to the Top*, the Obama Administration's education reform program, is also influential. *Race to the Top* works alongside No Child Left Behind to offer competitive grants to states who are "leading the way with ambitious yet achievable plans for implementing coherent, compelling, and comprehensive education reform." U.S. DEP'T OF EDUC., *RACE TO THE TOP* (2016), <http://www2.ed.gov/programs/racetothetop/index.html> [<https://perma.cc/ADN9-34CK>]. While the success of the program is controversial, evaluating the merits of the program is beyond the scope of this Note. See, e.g., Diane Ravitch, *Obama's Race to the Top Will Not Improve Education*, HUFFINGTON POST (Aug. 1, 2010, 1:27 PM), [http://www.huffingtonpost.com/diane-ravitch/obamas-race-to-the-top-wi\\_b\\_666598.html](http://www.huffingtonpost.com/diane-ravitch/obamas-race-to-the-top-wi_b_666598.html) [<https://perma.cc/MZ56-UBSY>].

63. 42 U.S.C. § 290jj (2006).

This law, known as the Children's Health Act of 2000, was passed in response to studies that indicated a staggering number of deaths caused by restraint in psychiatric and mental health facilities. See U.S. GEN. ACCOUNTING OFF.,

Congress's role in school discipline policy extends beyond legislation. In 2009, the House of Representatives' Committee on Education and Labor requested the Government Accountability Office ("GAO") review the available evidence on the use of restraint and seclusion that resulted in death and abuse at public and private schools and treatment centers.<sup>64</sup> The GAO reviewed applicable federal and state law, interviewed experts and government officials, and investigated abuse allegations made by students between 1990 and 2009.<sup>65</sup> On May 19, 2009, the GAO published *Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers* (the "GAO Report").<sup>66</sup>

The GAO Report presented three key findings.<sup>67</sup> First, in the absence of any federal regulation of the use of physical restraint and seclusion, states had enacted a wide variety of divergent regulations.<sup>68</sup> Second, there were no reliable national data on the use of physical restraint and seclusion in schools.<sup>69</sup> However, the GAO identified several hundred cases of alleged abuse, including some that resulted in death, related to physical restraint or seclusion of students in public and private schools.<sup>70</sup> Finally, the GAO Report provided case studies where the abuse of students by physical restraint or seclusion resulted in criminal conviction, civil liability, or massive settlement payouts.<sup>71</sup> The GAO further observed that many of the instances of alleged abuse were associated with untrained or poorly trained staff.<sup>72</sup>

The GAO report had a significant – albeit temporary – impact on federal legislators. Following a May 19, 2009 hearing on the GAO Report before the House of Representatives' Committee on Education and Labor, members of Congress began drafting federal legislation to address the use of physical restraint and seclusion in public schools.<sup>73</sup> The 111th Congress introduced

---

MENTAL HEALTH: IMPROPER RESTRAINT OR SECLUSION USE PLACES PEOPLE AT RISK 6–7 (1999), <http://www.gao.gov/archive/1999/he99176.pdf> [<https://perma.cc/F6N8-PFFV>] (describing the dangerous use and effects of restraint and seclusion in mental health facilities and hospitals and showing that children are disproportionately affected).

64. U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-719T, SECLUSIONS AND RESTRAINTS: SELECTED CASES OF DEATH AND ABUSE AT PUBLIC AND PRIVATE SCHOOLS AND TREATMENT CENTERS (2009), <https://www.gao.gov/new.items/d09719t.pdf> [<https://perma.cc/KM7C-Q96J>].

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Examining the Abusive and Deadly Use of Seclusion and Restraint in Schools: Hearing Before the H. Comm. on Educ. & Labor*, 111th Cong. (2009),

one House bill and two Senate bills.<sup>74</sup> All of the bills were debated by their respective chambers, but none of them ever became law.<sup>75</sup>

The 112<sup>th</sup> Congress reintroduced the House bill (H.R. 1381) and one of the Senate bills (S. 2020).<sup>76</sup> The shared purposes of the bills were to: (1) prevent and reduce the use of physical restraint and seclusion in schools;<sup>77</sup> (2) protect students from “physical or mental abuse”;<sup>78</sup> and (3) assist states and local school boards in “establishing policies and procedures”<sup>79</sup> and “the development of effective intervention and prevention practices that do not use restraints and seclusion.”<sup>80</sup> The proposed bills would have authorized support to states and municipalities in adopting more stringent oversight of the use of restraint and seclusion in schools and would have established requirements for collecting data on the use of these practices in schools.<sup>81</sup> However, no further actions were taken on S. 2020 after its introduction<sup>82</sup> and H.R. 1381 was referred to various subcommittees but never voted on.<sup>83</sup> Thus, the momentum generated by the GAO Report in 2009 dissipated by 2012, leaving no legislative impact.

### *B. Missouri’s Role in Education*

In the United States, education is mainly a concern of state and local government.<sup>84</sup> While the federal Constitution makes no mention of education, an entire Article of the Missouri Constitution is dedicated to the topic.<sup>85</sup> However, the Missouri Constitution is silent on student discipline and the Missouri legislature has done very little to fill in the gaps.<sup>86</sup> The 2009 GAO

---

<https://www.govinfo.gov/content/pkg/CHRG-111hhrg49597/pdf/CHRG-111hhrg49597.pdf> [<https://perma.cc/BB68-RAEH>].

74. *See* Keeping All Students Safe Act, H.R. 4247, 111th Cong. (2009); Preventing Harmful Restraint and Seclusion in Schools Act, S. 2860, 111th Cong. (2009); Keeping All Students Safe Act, S. 3895, 111th Cong. (2010).

75. H.R. 4247; S. 2860; S. 3895.

76. H.R. 4247 and S. 3895 were reintroduced as H.R. 1381 and S. 2020, respectively. *See* Keeping All Students Safe Act, H.R. 1381, 112th Cong. (2011); Keeping All Students Safe Act, S. 2020, 112th Cong. (2011).

77. H.R. 1381 § 3(1).

78. H.R. 1381 § 3(3)(A); S. 2020 § 3(2).

79. H.R. 1381 § 3(5)(A).

80. S. 2020 § 3(1).

81. *Compare* S. 2020 § 6 (requiring state educational agencies to submit a report to the U.S. Secretary of Education on the use of physical restraints), *with* H.R. 1381 § 6(b) (requiring the same reports).

82. S. 2020.

83. H.R. 1381.

84. U.S. DEP’T OF EDUC., *THE FEDERAL ROLE IN EDUCATION* (2012), <http://www2.ed.gov/about/overview/fed/role.html>.

85. MO. CONST. art. IX.

86. *See* MO. CONST. (providing no guidance on student discipline).

Report referenced Missouri as one of nineteen states with no laws or regulations governing the use of physical restraint.<sup>87</sup> Not only does Missouri have far fewer rules than other states concerning the use of physical restraints in public schools, it currently confers upon local school boards near-absolute authority to establish their own disciplinary policies and largely govern themselves.<sup>88</sup> According to a 2010 DoEd survey of state laws on seclusion and restraint, “Missouri has adopted a widely known and well-established philosophy and tradition of local control in education. Schools, districts[,] and communities take pride in their ability to develop and implement local policies.”<sup>89</sup>

In July 2010, following the federal push for enhanced state laws and regulations, Missouri enacted new legislation pertaining to physical restraint.<sup>90</sup> This new law added three additional requirements.<sup>91</sup> First, all school discipline policies were required to prohibit the confinement of a student in an unattended, locked space, except for in an emergency situation while awaiting law enforcement.<sup>92</sup> Next, in addition to its existing discipline policies under Section 160.261, each local school board was required to formulate “a written policy that comprehensively addresses the use of restrictive behavioral interventions as a form of discipline or behavior management technique.”<sup>93</sup> This policy must be consistent with “professionally accepted practices and standards of student discipline, behavior management, health[,] and safety, including the safe schools act.”<sup>94</sup> Under this law, school boards were required to (1) define restraint and seclusion; (2) describe the “circumstances under which restrictive behavioral intervention is allowed and prohibited”; (3) outline specific implementation requirements for restrictive behavioral intervention; and (4) specify the documentation, notice, and permission requirements when restrictive

---

87. U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-719T, SECLUSIONS AND RESTRAINTS: SELECTED CASES OF DEATH AND ABUSE AT PUBLIC AND PRIVATE SCHOOLS AND TREATMENT CENTERS (2009), <https://www.gao.gov/new.items/d09719t.pdf> [<https://perma.cc/KFF4-U5PS>].

88. MO. REV. STAT. § 160.261 (2018). Among the decisions delegated to local school boards were (1) the use of corporal punishment, (2) the school board's reporting requirements for acts of violence, and (3) the definition of violence. *Id.* at § 160.261(9)–(10).

89. U.S. DEP'T OF EDUC., SUMMARY OF SECLUSION AND RESTRAINT STATUTES, REGULATIONS, POLICIES, AND GUIDANCE, BY STATE AND TERRITORY: INFORMATION AS REPORTED TO THE REGIONAL COMPREHENSIVE CENTERS AND GATHERED FROM OTHER SOURCES, 120 (2010), <https://www2.ed.gov/policy/seclusion/summary-by-state.pdf> [ ].

90. MO. REV. STAT. § 160.263.

91. *See id.*

92. *Id.* at § 160.263(1).

93. *Id.* at § 160.263(2).

94. *Id.*

behavioral intervention is used.<sup>95</sup> Finally, the new law required MODESE to disseminate to local school boards a model policy which complied with the new law.<sup>96</sup>

As required, MODESE released its “Model Policy on Seclusion and Restraint” (“Model Policy”) on July 1, 2010.<sup>97</sup> The Model Policy clarified some of the statutory ambiguities, including the provision of a definition for “physical restraint.”<sup>98</sup> First, it limits the use of physical restraint to (1) emergencies; (2) when less restrictive measures fail to de-escalate; or (3) when physical restraint is specifically authorized by the student’s individualized education plan (“IEP”), Section 504 Plan, or other parentally agreed-upon behavioral plan.<sup>99</sup> The Model Policy also lists four requirements for the use of physical restraint. Physical restraint “shall only be used for as long as necessary to resolve the actual risk of danger or harm” and shall “use no more than the degree of force necessary to protect the student or other persons from imminent bodily injury.”<sup>100</sup> Further, physical restraints can “[o]nly be done by school personnel trained in the proper use of restraint.”<sup>101</sup> Finally, the Model Policy instructs against the “place[ment of] pressure or weight on the chest, lungs, sternum, diaphragm, back, neck or throat of the student which restricts breathing.”<sup>102</sup>

The Model Policy also provides that school personnel may only use methods of restraint “in which the person has received district approved training” and must “[c]onduct [the] restraint with at least one additional adult

---

95. *Id.*

96. *Id.* at § 160.263(3).

97. MISSOURI DEP’T OF ELEMENTARY AND SECONDARY EDUC., MODEL POLICY ON SECLUSION AND RESTRAINT (2010).

98. The Model Policy defines “physical restraint” as “a personal restriction that immobilizes or reduces the ability of a student to move his torso, arms, legs, or head freely. It does not include briefly holding a student without undue force for instructional purposes, briefly holding a student to calm them, taking a student’s hand to transport them for safety purposes, physical escort or intervening in a fight.” *Id.* Many school boards, including the St. Louis School District, have adopted this definition in its entirety. See, e.g., SPECIAL ADMIN. BD. OF THE TRANSITIONAL SCH. DIST. OF THE CITY OF ST. LOUIS, SCHOOL VIOLENCE AND RESTRICTIVE BEHAVIORAL INTERVENTION POLICY (2012), [http://sab.slps.org/Board\\_Education/policies/5144.1.htm](http://sab.slps.org/Board_Education/policies/5144.1.htm) [<https://perma.cc/5W5W-NRFC>] (Defining “Physical Restraint” as “The use of person to person physical contact to restrict the free movement of all or a portion of a student’s body. It does not include briefly holding a student without undue force for instructional or other purposes, briefly holding a student to calm the student, taking a student’s hand to transport him or her for safety purposes, physical escort, or intervening in a fight.”).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

present and in line of sight unless other school personnel are not immediately available due to the unforeseeable nature of the emergency situation.”<sup>103</sup> Finally, as the Model Policy notes, “Physical restraints should never be used as a form of punishment or for the convenience of school personnel.”<sup>104</sup> Any and all guidance issued by MODESE is non-binding upon local school boards.<sup>105</sup> Schools may institute their own language as long as it complies with the statutory requirements.<sup>106</sup>

#### IV. INSTANT DECISION

In the instant case, the Supreme Court of Missouri began its analysis with a discussion of the circumstances under which a public official is immune from suit. “‘Immunity’ connotes not only immunity from judgment but also immunity from suit.”<sup>107</sup> While generally considered an extraordinary remedy, a writ of prohibition is proper when a defendant is legally entitled to immunity.<sup>108</sup> The court carefully differentiated between sovereign immunity, which was not at issue in this case, and official immunity.<sup>109</sup> Official immunity is an affirmative defense that protects a public official from liability for negligence that is “strictly related to the performance of discretionary duties”<sup>110</sup> and “without malice.”<sup>111</sup> Unlike sovereign immunity, which has a statutory basis,<sup>112</sup> “[o]fficial immunity remains a matter of common law alone.”<sup>113</sup> The party asserting the affirmative defense

---

103. *Id.*

104. *Id.*

105. Butler, *supra* note 10, at 14.

106. *Id.*

107. State ex rel. Alsup v. Kanatzar, 588 S.W.3d 187, 190 (Mo. 2019) (en banc) (quoting State ex rel. Mo. Dep’t of Agric. v. McHenry, 687 S.W.2d 178, 181 (Mo. 1985) (en banc)).

108. *Id.* (citing State ex rel. Twiehaus v. Adolf, 706 S.W.2d 443, 444 (Mo. 1986) (en banc)).

109. “Broadly speaking, sovereign immunity protects governmental entities from tort liability and can be invoked when a governmental official is sued only in his or her official capacity. Official immunity, on the other hand, protects public officials sued in their individual capacities ‘from liability for alleged acts of negligence committed during the course of their official duties for the performance of discretionary acts.’” *Id.* (quoting State ex rel. Twiehaus, 706 S.W.2d at 444.).

110. *Id.* at 191 (quoting Green v. Lebanon R-III Sch. Dist., 13 S.W.2d 278, 284 (Mo. 2000) (en banc)).

111. *Id.*

112. See MO. REV. STAT. §§ 537.600–537.650 (2016).

113. Kanatzar, 588 S.W.3d at 190 n.6 (citing Southers v. City of Farmington, 263 S.W.3d 603, 610 (Mo. 2008) (en banc)). (“Two types of immunity often are confused when suit is brought against a governmental official. Broadly speaking, sovereign immunity protects governmental entities from tort liability and can be

of official immunity bears the burden of pleading and proving that s/he is entitled to that defense.<sup>114</sup> As the court pointed out, the underlying policy of the official immunity doctrine is “to allow public officials to ‘make judgments affecting the public safety and welfare’ without ‘[t]he fear of personal liability.’”<sup>115</sup> In establishing that Alsup was a public official, the court pointed out that “Alsup is an employee of the school district, a governmental entity”<sup>116</sup> and “Mariano does not dispute that Alsup is a public official.”<sup>117</sup>

The court then outlined the “narrow exception” to official immunity: “[W]hen a public officer fails to perform a *ministerial* duty required of him by law, he may be personally liable for the damages caused.”<sup>118</sup> The court provided a detailed discussion of the differences between ministerial and discretionary acts.<sup>119</sup> Notably, a ministerial act is one that is “merely ‘clerical’”<sup>120</sup> and “of such a routine and mundane nature that it is likely to be delegated to subordinate officials.”<sup>121</sup> To clarify the distinction further, the court then analogized ministerial acts falling outside of the protection of official immunity to ministerial acts that an official can be compelled to perform by writ of mandamus.<sup>122</sup> The proper test, which is the same under both inquiries, is whether the duty is “of a clerical nature which a public officer is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to his own judgment or opinion concerning the propriety of the act to be performed.”<sup>123</sup> If the answer is yes, the duty is ministerial.<sup>124</sup> Thus, in the

---

invoked when a governmental official is sued only in his or her official capacity. Official immunity, on the other hand, protects public officials sued in their individual capacities “from liability for alleged acts of negligence committed during the course of their official duties for the performance of discretionary acts.”).

114. *Id.* at 193 (citing *Warren v. Paragon Techs. Grp., Inc.*, 950 S.W.2d 844, 846 (Mo. 1997) (en banc)).

115. *Id.* at 190 (quoting *Green v. Denison*, 738 S.W.2d 861, 865 (Mo. 1987) (en banc), *overruled on other grounds by* *Davis v. Lambert-St. Louis Int’l Airport*, 193 S.W.3d 760, 765 n.8 (Mo. 2006) (en banc)).

116. *Id.* at 193 (citing *Dritt v. Snodgrass*, 66 Mo. 286, 292 (1877)).

117. *Id.*

118. *Id.* at 191 (citing *Knox County v. Hunolt*, 19 S.W. 628, 630 (Mo. 1892)).

119. *Id.* at 191–92.

120. *Id.* at 191 (citing *McFaul v. Haley*, 166 Mo. 56, 65 S.W. 995, 998 (Mo. 1901)).

121. *Id.*

122. *Id.* at 191–92.

123. *Id.* at 192 (quoting *Curtis v. Mo. Democratic Party*, 548 S.W.3d 909, 915 (Mo. 2018) (en banc)).

124. *Id.* at 191–92.



eyes of the court, “the central question is whether there is any room whatsoever for variation in when and how a particular task can be done.”<sup>125</sup>

Mariano advanced a nuanced argument: Although he conceded that the decision to use a physical restraint was discretionary, he maintained that the manner in which a physical restraint was used is ministerial.<sup>126</sup> In the court’s view, Mariano “focuse[d] almost exclusively on the portion of the test for clerical or ministerial duties that refers to ‘obedience to the mandate of legal authority.’”<sup>127</sup> The court expressly stated that it is irrelevant, in determining whether a public official’s duty is ministerial, that a “statute or regulation may confer authority – or even a duty – to act.”<sup>128</sup> Thus, even when a public is statutorily required to act in a certain way in a certain situation – whether it be “‘fairly,’ ‘competently,’ ‘safely,’ or ‘reasonably’” – the action itself still falls within official immunity because “what constitutes fair, competent, safe, or reasonable may differ from time to time, place to place, and official to official.”<sup>129</sup> The court thus concluded that the decision to physically restrain a student is a discretionary duty and, because Alsup had neither a “clear and unequivocal duty to restrain Mariano” nor “to use a particular restraint in a particular way,” he was officially immune from suit.<sup>130</sup>

The Court also rejected Mariano’s argument that the task of student restraint was ministerial because Policy 2770 expressly limited Alsup’s use of physical restraints to “those methods of restraint in which the personnel has received district approved training.”<sup>131</sup> Because the CPI training included multiple physical restraint techniques, the court reasoned that Alsup was “authorized to select the [technique] he deemed appropriate, employ it with the amount of force he deemed necessary, and continue it for as long as he deemed proper.”<sup>132</sup> The court briefly addressed the testimony of Mariano’s expert witness, Dr. James Monk, who asserted that Alsup had applied the

125. *Id.* at 191; *see also* State ex rel. Clarke v. West, 198 S.W. 1111, 1113 (Mo. 1917) (en banc) (holding mandamus will not lie to direct “the particular action he will take in the matter” when law authorizes the officer to choose between alternatives).

126. *Kanatzar*, 588 S.W.3d at 193. “If the restraint had been properly executed, pursuant to the District’s policy and training, the Plaintiff’s arm would not have been broken.” Brief for Respondent, *supra* note 29, at 12.

127. *Kanatzar*, 588 S.W.3d at 192–93.

128. *Id.* at 192. “[T]he relevant inquiry is not whether the law authorizes, regulates, or requires an action. Instead, it is whether the action itself is ministerial or clerical.” *Id.*

129. *Id.* at 193.

130. *Id.* at 193–94.

131. *Id.* at 194. “Nothing in Policy 2770 imposed a clerical or ministerial duty on Alsup under these circumstances. *Cf.* Clarke, 198 S.W. at 1113 (holding “where an officer . . . has considered and determined what his course of action is to be . . . his action is not subject to review or control by mandamus”) (internal quotation marks omitted).” *Id.*

132. *Id.* at 194.

physical restraint technique incorrectly.<sup>133</sup> Dr. Monk further testified that Mariano's arm would not have been broken if Alsup had properly restrained him.<sup>134</sup> In the court's view, Dr. Monk's testimony "undercut Mariano's argument that Alsup was engaged in a ministerial task" because it demonstrated that the use of physical restraint involves discretionary judgment.<sup>135</sup>

In closing, the court compared Alsup's duty in this case to the "similar, though plainly not identical, situation in which police officers were confronted with an armed individual."<sup>136</sup> Official immunity is intended to shield public officials from liability in situations like these, which are "teeming with the necessity for quick judgment calls."<sup>137</sup> This is true even when "hindsight may demonstrate errors in judgment which might be branded as negligent by qualified evaluators."<sup>138</sup> Finally, the court concluded with a decisive affirmation of Alsup's immunity: "If five in-school suspension teachers had been confronted with a child acting the way Mariano was acting, all five could have acted differently and yet each could have remained in compliance with Policy 2770. This is the very antithesis of a clerical or ministerial duty."<sup>139</sup> The court thus granted Alsup's motion for summary judgment and reversed the Circuit Court and Court of Appeals.<sup>140</sup>

## V. COMMENT

Despite the 2010 attempt at clarification, Missouri law remains vague with regard to the use of physical restraint against public school students. There is no statutory definition of "physical restraint."<sup>141</sup> As a result, local school boards retain very broad discretion to define and draft their own discipline policies as well as the authority to self-regulate their compliance.<sup>142</sup>

---

133. *Id.* at 193.

134. Brief for Respondent, *supra* note 29, at 9.

135. *Kanatzar*, 588 S.W.3d at 193 n.10.

136. *Id.* at 194 (citing *Green v. Denison*, 738 S.W.2d 861, 865 (Mo. 1987) (en banc), *overruled on other grounds by* *Davis v. Lambert-St. Louis Int'l*, 193 S.W.3d 760, 765 n.8 (Mo. 2006) (en banc)). "In holding the officers were entitled to official immunity, this Court explained: 'It is hard to imagine a setting more demanding of judgment than one in which line officers . . . confront a person who has recently flourished a gun.'" *Id.* (quoting *Green*, 738 S.W.2d at 865).

137. *Id.* at 194 (quoting *Green*, 738 S.W.2d at 865).

138. *Id.* (quoting *Green*, 738 S.W.2d at 866).

139. *Id.*

140. *Id.* at 193 (citing *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 381 (Mo. 1993) (en banc)).

141. MO. REV. STAT. §§ 160.261, 160.263 (2016).

142. *See, e.g.,* SCHOOL VIOLENCE AND RESTRICTIVE BEHAVIORAL INTERVENTION POLICY, *supra* note 98 (Defining "Physical Restraint" as "The use of person to person physical contact to restrict the free movement of all or a portion of a student's body. It does not include briefly holding a student without

Missouri law prohibits only locked seclusion, except when awaiting law enforcement.<sup>143</sup> Missouri does not currently impose any reporting requirements on local school boards, except where a student was locked (not merely placed) in a seclusion room.<sup>144</sup> This is the extent of the legal obligations placed upon Missouri school districts regarding the physical restraint of students. Subpart A discusses the various bills proposed and considered by the Missouri legislature to reform the state's approach to physical restraint.

The current state of Missouri law becomes more troubling when compared to other states. Missouri is among four jurisdictions – South Dakota, Nebraska, and Washington, D.C. – with the least protection for students subjected to physical discipline.<sup>145</sup> As of July 2019, twenty-nine states have laws that provide meaningful protection from physical restraint.<sup>146</sup> Twenty-three states have statutes protecting children from the use of physical restraint except for when the student is an immediate threat of danger to themselves or others.<sup>147</sup> Missouri has no such statute.<sup>148</sup> Current Missouri law does not provide sufficient safeguards for students' constitutional rights or physical safety and thus must be changed. Subpart B outlines numerous policy recommendations to ameliorate the lack of guidance for school officials and lack of protection for students in Missouri, based in part on reforms already enacted in a majority of other states.

---

undue force for instructional or other purposes, briefly holding a student to calm the student, taking a student's hand to transport him or her for safety purposes, physical escort, or intervening in a fight.”).

143. MO. REV. STAT. § 160.263(1) (2017).

144. *See* § 160.263.

145. Butler, *supra* note 10, at 14 (reporting that, as of July 2019, the states with the “weakest protection for students” were Missouri, which bans only solitary locked seclusion unless awaiting law enforcement; Nebraska, which requires local education agencies to adopt restraint and seclusion policies, without imposing any requirements whatsoever; Washington, D.C., which prohibits only “unreasonable” restraint; and South Dakota, which requires school district policies, but little else).

146. *See id.* at 11. These states include: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Maine, Michigan, Mississippi, New Hampshire, New Mexico, North Carolina, Ohio, Oregon, Rhode Island, Vermont, Utah, Washington, West Virginia, and Wisconsin. *Id.* “To provide meaningful protection, a state must fall into one of two categories. One, it provides multiple protections against restraint and seclusion for students. Two, it has few protections but strictly limits the technique to emergency threats of physical harm. States that protect only against one practice are not regarded as having meaningful protections.” *Id.* at 11 n.37.

147. *Id.* at 25.

148. *Id.*

*A. Missouri Legislature Proposed Legislation*

Although efforts to pass comprehensive reform have failed in the past, they were revived following the Supreme Court of Missouri's ruling in *Kanatzar*.<sup>149</sup> Representative Ian Mackey filed HB 1023 in 2019.<sup>150</sup> The bill passed through its committee by a unanimous vote, but the Speaker never called it to the floor for debate.<sup>151</sup> Rep. Mackey refiled the bill in 2020 as HB 1569.<sup>152</sup> HB 1569 would have required school districts to report incidents of physical restraint and seclusion, effective 2021.<sup>153</sup> Specifically, HB 1569 would have required school districts to notify parents within twenty-four hours<sup>154</sup> and report all incidences of restraint and seclusion to DESE within thirty days.<sup>155</sup> Moreover, HB 1569 would have given parents and/or guardians the right to review the DESE report and to file a complaint.<sup>156</sup>

At the same time, Representative Dottie Bailey filed House Bill 1568 ("HB 1568"), a bill with very similar language to HB 1569.<sup>157</sup> Both HB 1568 and HB 1569 would have repealed Mo. Rev. Stat. Section 160.263.<sup>158</sup> Further, both HB 1568 and HB 1569 would have limited the use of restraint and seclusion to instances of immediate threats to physical safety.<sup>159</sup> However, HB 1568 did have significant additions. First, it required parents or legal guardians to file a complaint with the school district or charter school and, if their "concerns . . . are not satisfactorily resolved," they may file the complaint with MODESE.<sup>160</sup> HB 1568 also required schools to "make and preserve both an audio and video recording of any incident involving seclusion or isolation"<sup>161</sup> and "provide the parents or legal guardians . . . with a copy of every audio and video recording and written observation created under subsection 2."<sup>162</sup> HB 1568 specified that reports of restraint and

---

149. See H.B. 1023, 100th Gen. Assemb., 1st Sess. (Mo. 2019).

150. Mo. H.B. 1023, 100th Gen. Assemb., 1st Sess. (Mo. 2019), <https://house.mo.gov/Bill.aspx?bill=HB1023&year=2019&code=R..>

151. See *id.*

152. See H.B. 1569, 100th Gen. Assemb., 2d Sess. (Mo. 2020), <https://house.mo.gov/bill.aspx?bill=HB1569&year=2020&code=R..>

153. Mo. H.B. 1569 § 4(1).

154. Mo. H.B. 1569 § 4(2).

155. Mo. H.B. 1569 § 4(1).

156. Mo. H.B. 1569 §§ 4(3)–(4).

157. Compare H.B. 1568, 100th Gen. Assemb., 2d Sess. (Mo. 2020), with Mo. H.B. 1569.

158.

Mo. H.B. 1568; Mo. H.B. 1569.

159. Mo. H.B. 1568 § 3(2); Mo. H.B. 1569 § 3.

160. H.B. 1568(4)(6).

161. H.B. 1568(2)(3).

162. H.B. 1568 § 4(4).

seclusion must be written.<sup>163</sup> Further, HB 1568 specified that it applies to charter schools as well as public school districts.<sup>164</sup>

The strengthened provisions of both bills would have brought Missouri in line with the majority of states on the use of physical restraint in public schools. Unfortunately, neither bill became law in the 2020 legislative session. HB 1568 passed the House and the Senate Committee on Education, but was never voted on by the Senate.<sup>165</sup>

### *B. Policy Recommendations for Missouri Education Reform*

Regardless of the Missouri legislature's failure to act, there are a number of ways in which Missouri law can be improved to limit the use of physical restraint in schools and ultimately protect students and school officials. The use and misuse of physical restraint is not unique to Missouri. The majority of other states and municipalities have been more proactive in addressing this issue, and their attempts provide invaluable insights for how Missouri might craft its approach.<sup>166</sup> Moreover, despite Missouri's legislative and administrative stagnation, the localized nature of education policy allows for many of the reforms outlined below can be enacted on the county-, city-, or district-level.<sup>167</sup>

First and foremost, Missouri should replace its voluntary guidelines with enforceable statutes and regulations, thus joining the majority of states with

---

163. Mo. H.B. 1568 § 4(3)(a).

164. *See, e.g.*, Mo. H.B. 1568 §§ 3(2), 4(2).

165. Missouri House of Representatives, *HB 1568*, (last updated April 28, 2020) <https://house.mo.gov/Bill.aspx?bill=HB1568&year=2020&code=R> <https://perma.cc/XX77-UYE6>.

166. *See* Butler, *supra* note 10, at 11.

167. For example, in 2015, Virginia passed a law that sharply limited the use of physical restraint and seclusion, but has yet to promulgate the required regulations to enforce the statute. *See* VA. CODE. ANN. § 22.1-279.1:1 (2019). In the absence of statewide regulations on physical restraint and seclusion, the school board of the largest county in Virginia allocated \$1 million “to remedy isolation and restraint practices in the district.” Jenny Abamu, *Fairfax County Allocates Over \$1 Million To Address Seclusion and Restraint Practices*, WAMU (May 24, 2019), <https://wamu.org/story/19/05/24/fairfax-county-allocates-over-1-million-to-address-seclusion-and-restraint-practices> [<https://perma.cc/KUF4-SLVT>]. The Fairfax County Public School Board made this decision following the publication of a 2018 investigation by a local public broadcast affiliate, which revealed that hundreds of instances of physical restraint and seclusion had gone unreported by district staff. Jenny Abamu, *Children Are Routinely Isolated In Some Fairfax County Schools. The District Didn't Report It*, WAMU (Mar. 13, 2019), <https://wamu.org/story/19/03/13/children-are-routinely-isolated-in-some-fairfax-county-schools-the-district-didnt-report-it/> [<https://perma.cc/QE8S-CDBB>].

strong legal protections for students from physical restraint.<sup>168</sup> Further, Missouri lawmakers should impose reasonable limitations on the circumstances and ways in which physical restraint may be used. Most states limit the use of physical restraint to threats of physical harm.<sup>169</sup> Many states also expressly prohibit the use of physical restraint as discipline or punishment.<sup>170</sup> In determining the scope of applicability for physical restraints, policymakers should carefully consider prohibiting their use

---

168. See ALA. CODE § 16-1-14 (1975); ALASKA STAT. § 14.33.125 (2014); ARIZ. REV. STAT. § 15-105 (2015); CAL. EDUC. CODE §§ 49005–49006.4 (West 2019); COLO. REV. STAT. § 26-20-111 (2017); CONN. GEN. STAT. § 10-236b (2015); DEL. CODE ANN., tit. 14, § 4112F (2014); FLA. STAT. § 1003.573 (2011); GA. CODE ANN. § 20-2-240 (1987); GA. COMP. R. & REGS. 160-5-1-.35 (2010); HAW. REV. STAT. §§ 302A-1141.4 (2014); 23 ILL. ADMIN. CODE tit. 23 § 1.285 (2020); IND. CODE §§ 20-20-40-5, 20-20-40-11, 20-20-40-14 (2019); IOWA CODE § 280.21 (2017); IOWA ADMIN. CODE r. 281-103 (2011); KAN. STAT. ANN. §§ 72-6151-72-6158 (2015); 704 KY. ADMIN. REGS. 7:160 (2019); ME. STAT. tit. 20-A § 4502 (2013); 05-071 ME. CODE R. §§ 33.1-33.13 (LexisNexis 2001); MD. CODE ANN., EDUC. §§ 7-1101-1104 (2017); MD. CODE REGS. 13A.08.04.02-13A.08.04.06 (2020); MASS. GEN. LAWS ANN. ch. 76, § 37G (West 2000); 603 MASS. CODE REGS. 46.01-46.07 (2016); MICH. COMP. LAWS §§ 380.1307a-h (2017); 07-000 MISS. CODE R. § 003.1.1 (LexisNexis 2020); N.H. REV. STAT. ANN. §§ 126-U:1–U:8 (2010); N.M. STAT. ANN. § 22-5-4.12 (2017); N.C. GEN. STAT. §§ 115C-390.3, 115C-391.1 (2011); OHIO REV. CODE ANN. § 3319.4 (2018); OHIO ADMIN. CODE 3301-35-15 (2014); OR. REV. STAT. §§ 161.205, 339.285 (2019); OR. ADMIN. R. 581-021-0550, 581-021-0553 (2019); R.I. GEN. LAWS § 16-60-4 (2017); 200 R.I. CODE R. §§ 20-30-2.1–2.4 (2006); UTAH CODE ANN. §§ 53G-8-203, 53G-8-302 (1994); VT. STAT. ANN. tit. 16, § 1167 (2012); 22-036 VT. CODE R. §§ 4500–4510 (2011); WASH. REV. CODE § 28A.600.485 (2015); WASH. ADMIN. CODE § 392-400-825 (2018); W. VA. CODE R. § § 126-99-5 (2019); WIS. STAT. §§ 118.305, 118.31 (2019).

169. See, e.g., ALASKA STAT. § 14.33.125(b) (2014); COLO. REV. STAT. §§ 26-20-111(2)–(3) (2017); CONN. GEN. STAT. § 10-236b(6)(b) (2015); DEL. CODE ANN., tit. 14, §§ 4112F(b)(2)(a), (e) (2014); ILL. ADMIN. CODE tit. 23, § 1.285(d)(1) (2020).

170. The following states have enacted such a prohibition: Alaska, Alabama, Arizona, California, Colorado, Connecticut, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Mississippi, New Hampshire, Ohio, Oregon, Rhode Island, Utah, Vermont, West Virginia, and Wyoming. Butler, *supra* note 10, at 53. The following states have enacted such a prohibition, but only with respect to students with disabilities: Louisiana, Minnesota, Pennsylvania, Tennessee, and New York. *Id.* Missouri, on the other hand, expressly states that “[s]panking, when administered by certificated personnel and in the presence of a witness who is an employee of the school district, or the use of reasonable force to protect persons or property, when administered by personnel of a school district in a reasonable manner in accordance with the local board of education’s written policy of discipline, is not abuse within the meaning of chapter 210.” MO. REV. STAT. § 160.261(10) (2017) (emphasis added).

altogether. As aforementioned, the efficacy of this intervention method is far from established.<sup>171</sup> Moreover, under existing federal law, children are protected from the use of physical restraints in other contexts, such as hospitals and other inpatient institutions.<sup>172</sup> At the very least, state law should require that less restrictive interventions fail or prove ineffective before physical restraint can be used.<sup>173</sup> Moreover, the use of physical restraint should cease as soon as the emergency subsides.<sup>174</sup>

---

171. . *Classrooms in Crisis: Examining the Inappropriate Use of Seclusion and Restraint Practices: Hearing Before the Subcomm. on Early Childhood, Elementary, and Secondary Education of the H. Comm. on Educ. & the Workforce*, 116th Cong. 7-10 (2019) (statement of George Sugai, Ph.D., Neag School of Education, University of Connecticut); *Beyond Seclusion and Restraint: Creating Positive Learning Environments for All Students: Hearing Before the Sen. Comm. on Health, Educ., Labor, & Pensions*, 112th Cong. 4-6 (2012) (statement of Daniel Crimmins, Ph.D., Director, Center for Leadership in Disability).

172. 42 U.S.C. § 290jj (2000). Known as the Children's Health Act of 2000, this law amended Title V of the Public Health Service Act and was passed in response to studies that indicated a staggering number of deaths caused by restraint in psychiatric and mental health facilities. *See* U.S. GEN. ACCOUNTING OFF., MENTAL HEALTH: IMPROPER RESTRAINT OR SECLUSION USE PLACES PEOPLE AT RISK 6-7 (1999), <https://www.gao.gov/assets/230/228149.pdf> [<https://perma.cc/JBE8-WGYQ>] (describing the dangerous use and effects of restraint and seclusion in mental health facilities and hospitals and showing that children are disproportionately affected).

173. States that have enacted a similar provision include Alabama, Alaska, Arizona, California, Connecticut, Colorado, Delaware, Georgia, Hawaii, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, New Mexico, Ohio, Oregon, Rhode Island, Vermont, and Wisconsin. Butler, *supra* note 10, at 56.

174. Alaska, Alabama, Arizona, California, Colorado, Connecticut, Delaware (restraint only), Georgia, Hawaii, Illinois (restraint only), Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Mississippi, Michigan, New Hampshire, New Mexico, Ohio, Oregon, Rhode Island, Vermont, Utah, Washington, Wisconsin, and West Virginia. *See id.* at 60-61. ("By law, restraint must cease when there is no longer an emergency for all students in 27 states, for children with disabilities, in 31 states: Alaska, Alabama, Arizona, California, Colorado, Connecticut, Delaware (restraint only), Georgia, Hawaii, Illinois (restraint only), Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Michigan, New Hampshire, New Mexico (2017), Nevada, Ohio, Oregon, Rhode Island, Texas, Vermont, Utah, Washington, Wisconsin, and West Virginia . . . Maryland's durational limit differs from the others in that it sets a hard deadline of 30 minutes under all circumstances, which seems designed to protect children. Maryland is to be lauded for this, but the standard may raise some issues if an emergency ends within 5-10 minutes and a child is still in restraint or seclusion.").

When physical restraints are used, every effort must be made to reduce the risk of physical harm to the student. As illustrated by Israel Mariano's experience, as well as the GAO Report's finding of at least twenty student deaths from physical restraint, the risk to students cannot be overstated and must be substantially mitigated wherever possible.<sup>175</sup> Accordingly, state law should ban physical restraints that pose a grave risk to life, namely mechanical restraints,<sup>176</sup> chemical restraints,<sup>177</sup> and restraints that restrict breathing. Twenty-seven states prohibit physical restraints that obstruct breathing or threaten life, regardless of whether the student has disabilities.<sup>178</sup> Even states

---

175. State ex rel. Alsup v. Kanatzar, 588 S.W.3d 187, 189 (Mo. banc 2019); U.S. GEN. ACCOUNTING OFF., MENTAL HEALTH: IMPROPER RESTRAINT OR SECLUSION USE PLACES PEOPLE AT RISK 6–7 (1999), <https://www.gao.gov/assets/230/228149.pdf> [<https://perma.cc/JBE8-WGYQ>].

176. Mechanical restraint is defined as “[t]he use of any device or equipment to restrict a student’s freedom of movement.” U.S. DEP’T OF EDUC., RESTRAINT AND SECLUSION: RESOURCE DOCUMENT 10 (2012), <https://sites.ed.gov/idea/files/restraints-and-seclusion-resources.pdf> [<https://perma.cc/JBE8-WGYQ>]. Common examples of mechanical restraints involve ropes, duct tape, bungee cords, and other devices. See MAJORITY STAFF OF S. COMM. ON HEALTH, EDUC., LABOR, & PENSIONS, 113TH CONG., REP. ON DANGEROUS USE OF SECLUSION AND RESTRAINTS IN SCHOOLS REMAINS WIDESPREAD AND DIFFICULT TO REMEDY: A REVIEW OF TEN CASES, 6, 17–18, 24, 26–27, 29 (2014), <https://www.help.senate.gov/imo/media/doc/Seclusion%20and%20Restraints%20Final%20Report.pdf> [<https://perma.cc/6NES-KRQZ>]. The states that ban mechanical restraint of all children include Alabama, Alaska, Colorado (with exceptions for children displaying deadly weapons and other exceptions), Georgia, Hawaii, Indiana, Illinois, Iowa, Kansas, Kentucky, Louisiana (only for children with disabilities), Maine, Massachusetts, Michigan, Mississippi, Montana (only for children with disabilities), Ohio, Oregon, Pennsylvania (only for children with disabilities), Tennessee (only for children with disabilities), Utah, Vermont, Wyoming, West Virginia, and Wisconsin. Butler, *supra* note 10, at 70.

177. Chemical restraints involve the use of chemicals to restrict a student’s freedom of movement. Butler, *supra* note 10, at 71. The states that currently prohibit chemical restraints include Alabama, Alaska, Colorado, Delaware, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Mississippi, Ohio, Oregon, Rhode Island, Utah, Vermont, and Wisconsin. *Id.* Two states, Connecticut and Tennessee, have laws that regulate chemical restraint differently, explicitly allowing its use under certain circumstances. *Id.* at 71–72.

178. These states include Alaska, Alabama, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, New Mexico, Oregon, Ohio, Rhode Island, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *Id.* at 64–65.



without such prohibitions have enacted some form of protection against restraints which restrict breathing.<sup>179</sup>

The use of physical restraints can also be limited through investment in positive behavioral support and preventative interventions.<sup>180</sup> By providing school officials with trauma-informed training, they are better able to respond to a potentially threatening situation and are less likely to have to resort to physical restraint.<sup>181</sup> While Missouri's non-binding guidance urges training in "safe and appropriate use" of physical restraints, other states have taken various other approaches. States differ widely in the type of training required, though only a few states have explicitly required that school officials receive training on evidence-based techniques "shown to be effective" in preventing the use of the practices and in keeping personnel and students safe, and only for certain requirements.<sup>182</sup> Roughly half of all states require school officials to be trained in conflict de-escalation and the prevention of physical restraint.<sup>183</sup> A smaller number of these states also train staff on positive

179. Georgia law prohibits the use of "prone restraint" on all students, while Pennsylvania law prohibits its use on students with disabilities. *Id.* at 64. Prone restraint, which involves pinning a student face-down, often causes suffocation because the compression of the chest cavity prevents the lungs from expanding. DISABILITY RIGHTS CALIFORNIA, THE LETHAL HAZARD OF PRONE RESTRAINT: POSITIONAL ASPHYXIATION 17–18 (2002), <https://www.disabilityrightsca.org/system/files?file=file-attachments/701801.pdf> [<https://perma.cc/QV3F-DV95>]; NATIONAL DISABILITY RIGHTS NETWORK, SCHOOL IS NOT SUPPOSED TO HURT: INVESTIGATIVE REPORT ON ABUSIVE RESTRAINT AND SECLUSION IN SCHOOLS 13 (2009), <https://www.ndrn.org/wp-content/uploads/2019/03/SR-Report2009.pdf> [<https://perma.cc/3QUA-6M23>] ("Studies and organizations, including the Joint Commission on Accreditation of Healthcare Organizations, have concluded that prone restraint may predispose a patient to suffocation.").

180. TEX. JUV. JUSTICE DEPT., EFFECTIVENESS OF POSITIVE BEHAVIORAL SUPPORTS, REPORT TO TEXAS LEGISLATURE 22 (2012), <https://www2.tjtd.texas.gov/publications/reports/PBISLegislativeReport2012-12.pdf> [<https://perma.cc/8EWE-BLJY>].

181. NAT'L ASS'N OF ST. MENTAL HEALTH PROGRAM DIRECTORS, SIX CORE STRATEGIES TO REDUCE THE USE OF SECLUSION AND RESTRAINT AS A PLANNING TOOL 2 (2006), <https://www.nasmhpd.org/sites/default/files/Consolidated%20Six%20Core%20Strategies%20Document.pdf> [<https://perma.cc/68UG-U9UN>].

182. Butler, *supra* note 10, at 110. These states include Oregon, Utah, Wyoming, Alaska, and Hawaii. *Id.*

183. These states include Alaska, Alabama, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Maryland, Massachusetts, Maine, Minnesota (applies only to students with disabilities), Michigan, Mississippi, North Carolina, Nevada (applies only to students with disabilities), Ohio, Oregon, Rhode Island, Tennessee (applies only to students with disabilities), Texas (applies only to students with disabilities), Utah, Vermont, Wisconsin, West Virginia, and Wyoming. *Id.* at 111. Utah is also expected to

behavioral supports.<sup>184</sup> At least eight states require periodic retraining.<sup>185</sup> Some states require staff training on first aid, signs of medical distress, cardiopulmonary resuscitation and other similar issues.<sup>186</sup> Finally, a few states require training on the dangers of physical restraint.<sup>187</sup>

With regard to district-level data on the use of physical restraints, Missouri law should mandate reporting and incentivize transparency. It is in the public's interest to have accurate and up-to-date information about the use of physical restraint in public schools. While no one would ever question the fact that school officials work incredibly hard to protect students, physical restraints pose a unique risk of harm that necessitates additional safeguards to ensure transparency and accountability. At a bare minimum, state law should mandate that school boards provide annual reports on their use of physical restraint.<sup>188</sup> Several states have had such procedures in place for years.<sup>189</sup> One

---

adopt this provision in its final regulations, now in the final stages of promulgation. *Id.*

184. These states include Alaska, Alabama, Delaware, Georgia, Hawaii, Indiana, Iowa, Kansas, Kentucky, Michigan, Mississippi, North Carolina, Rhode Island, Vermont, and Wyoming. *Id.* In addition, "Utah requires training in evidence-based practices, which almost certainly includes training in positive and preventative behavioral supports." *Id.* Note that "states may require PBIS training in other statutes or regulations." *Id.*

185. Colorado (retrain every two years), Hawaii, Iowa (periodic retraining), Illinois (retrain every two years), Indiana (recurrent training in accord with plan adopted by each school), Michigan, Mississippi, New Jersey (applies only to students with disabilities; school officials must update training annually). *Id.* at 112.

186. These states include Alaska, Connecticut, Illinois, Maine, Maryland, Massachusetts, Michigan, Mississippi, Rhode Island (part of in-depth training for certain key staff), and Vermont. *Id.* at 111.

187. These states include Colorado (including dangers of prone restraint), Connecticut, Illinois, Iowa, Maryland, Massachusetts, Michigan, Rhode Island, and Vermont. *Id.*

188. *Id.* at 103. The states that currently require annual reporting to the State Educational Agency include Alaska, Alabama, California, Connecticut, Delaware, Florida (only for students with disabilities), Hawaii, Indiana, Kansas, Kentucky, Louisiana (only for students with disabilities), Maine, Massachusetts, Michigan, Mississippi, North Carolina, New Hampshire, Nevada (only for students with disabilities), Ohio, Oregon, Rhode Island, Tennessee (only for students with disabilities), Texas (only for students with disabilities), Utah, Washington, and Wyoming. *Id.*

189. For example, Connecticut recorded 37,929 incidents of restraint and seclusion for 2016-17, in response to its state data collection law. CONN. ST. DEPT. OF EDUC., 2017-2018 ANNUAL REPORT ON THE USE OF PHYSICAL RESTRAINT AND SECLUSION IN CONNECTICUT 5 (2017), <http://edsight.ct.gov/relatedreports/RS%20Report%20to%20Legislature%202016-17.pdf> [<https://perma.cc/FKQ9-72VN>]. Maine data collected under state law showed 3,576 restraint incidents and 4,217 seclusion incidents in 2018, with

of the major challenges to policymakers in addressing the misuse of physical restraints is the lack of available data.<sup>190</sup> This data can lead to reform at both the state- and local-level, by galvanizing lawmakers with concrete facts and by helping school districts identify and remedy the overuse of restraint in specific schools.<sup>191</sup> Finally, in addition to enacting reporting requirements, the state legislature should consider how the accuracy of these reports will be verified. There have been numerous examples of local school districts

---

seclusion increasing by 1,690 incidents from 2017. Me. Dep't of Educ. Data Restraint and Seclusion Annual Report (2018), <https://www.maine.gov/doe/schools/safeschools/restraint#data> [https://perma.cc/D9DN-FAV2]. Delaware data collected under state law included 3,006 incidents of physical restraint in 2016-17. Dela. Dep't of Educ., 2016-2017 ANNUAL REPORT ON THE USE OF PHYSICAL RESTRAINT IN DELAWARE PUBLIC DISTRICT AND CHARTER SCHOOLS 9 (2017), <https://www.doe.k12.de.us/cms/lib/DE01922744/Centricity/Domain/167/FINAL%20Restraint%202016-2017%20Annual%20Report%20Supressed%20.pdf> [https://perma.cc/GK27-RSNW]. Ohio's data showed more than 10,000 restraint and seclusion occurrences in 2013-14, many of which involved students with disabilities and young students, in the 3rd grade or below, Disability Rights Ohio reported in 2015. DISABILITY RIGHTS OHIO, THE STATE OF RESTRAINT AND SECLUSION IN OHIO: AN ANALYSIS OF DATA FROM OHIO'S PUBLIC SCHOOLS 3 (2015), [https://www.disabilityrightsohio.org/assets/documents/dro\\_restraint\\_and\\_seclusion\\_ode\\_data\\_report.pdf?pdf=restraint\\_and\\_seclusion\\_ode\\_data\\_report](https://www.disabilityrightsohio.org/assets/documents/dro_restraint_and_seclusion_ode_data_report.pdf?pdf=restraint_and_seclusion_ode_data_report) [https://perma.cc/C52D-AGZM].

190. Michael A. Nunno, *Restraint and Seclusion Use in U.S. School Settings: Recommendations From Allied Treatment Disciplines*, 82 AM. J. OF ORTHOPSYCHIATRY 75, 76 (2012).

191. Data collection and public attention can make a real difference, as seen in Florida. Florida began collecting data by law in 2010. In 2011-12, Florida recorded 9,751 restraint and 4,245 seclusion episodes in 2011-12. Sarah Gonzalez and John O'Connor, *Florida Keeps Two Sets of Seclusion Data and Why Neither May Tell the Full Story*, STATE IMPACT: A REPORTING PROJECT OF NPR (Aug. 14, 2012), <https://stateimpact.npr.org/florida/2012/08/14/florida-keeps-two-sets-of-seclusion-data-and-why-neither-may-tell-the-full-story/> [https://perma.cc/WN5B-SGGG]. The mandatory state data reporting caused Pasco, Florida schools to focus on how frequently seclusion was utilized and to move to end its use as twenty-eight other Florida districts did, the Tampa Bay Times reported. Jeffrey S. Solochech, *Pasco Schools Aim to End Use of Seclusion Rooms*, TAMPA BAY TIMES (Aug. 31, 2014), <https://www.tampabay.com/news/education/k12/pasco-schools-aim-to-end-use-of-seclusion-rooms/2195588/> [https://perma.cc/Y944-V68X]. The District's Director of Student Support Services explained, "Based on more recent research, and people being able to articulate the trauma they have experienced, we don't feel it's in the best interest of children. . . . We thought there were no other choices before." *Id.* A Special Education Supervisor echoed these sentiments, "The law helped us understand what our practices were. . . . We had to take ownership of it, and we have to take action to make things better." *Id.*

underreporting the number of disciplinary incidents that occurred in its schools.<sup>192</sup>

Finally, Missouri law should require more communication with and involvement of parents and/or guardians. Another important avenue for reform is increased parent involvement. Following the physical restraint of a student, prompt and candid communication with parents and/or guardians is crucial for many reasons. After an incident, the student may need immediate medical or psychological treatment. Communication also enables parents and school officials to work together to support the student and prevent further incidents. When parents are left in the dark, it undermines their trust in school officials and often leads to lengthy, costly, and painfully public disputes.<sup>193</sup>

---

192. In 2011-12, Prince William County Public Schools in Virginia (over 81,000 students in 88 schools) reported no use of restraint or seclusion, although news reports indicated that the practices were used with some frequency within the district. Donna St. George, *Prince William Schools Restrain, Seclude Disabled Kids Frequently, Inquiry Finds*, WASH. POST (Aug. 6, 2014), [https://www.washingtonpost.com/local/education/prince-william-schools-restrain-seclude-disabled-kids-too-frequently-inquiry-finds/2014/08/06/a2b2d6e8-1cbb-11e4-ab7b-696c295ddfd1\\_story.html](https://www.washingtonpost.com/local/education/prince-william-schools-restrain-seclude-disabled-kids-too-frequently-inquiry-finds/2014/08/06/a2b2d6e8-1cbb-11e4-ab7b-696c295ddfd1_story.html) [https://perma.cc/X9FJ-PSZT]; Kentucky's Jefferson County Public Schools reported only 174 restraint and seclusion episodes in 2014-15 to the state, even though it restrained or secluded students over 4,000 times, an event reported extensively by local media outlets. Allison Ross and Deborah Yetter, *State Slams JCPS, Orders Restraint Review*, *Louisville Courier-Journal* (July 20, 2016), <https://www.courier-journal.com/story/news/education/2016/07/20/state-does-on-site-review-jcps-over-restraint-concerns/87345324/> [https://perma.cc/PB8F-RPGG]. An independent auditor hired by the county reported that administrators found that some employees were allegedly discouraged from reporting serious disciplinary incidents. *Id.* As part of the ensuing investigation, the Kentucky Education Commissioner sent personnel to review the district's restraint and seclusion policies. *See id.*; Allison Ross, *Audit: 'Code of Silence' in JCPS on Restraint*, *LOUISVILLE COURIER-JOURNAL* (May 10, 2016), <https://www.courier-journal.com/story/news/education/2016/05/10/audit-code-silence-jcps-restraint/84176526/> [https://perma.cc/KJ9T-6UNX]; Antoinette Konz, *Auditor: JCPS Employees Were Told Not to Report Seclusion, Restraint Incidents*, *WDRB* (May 10, 2016), [https://www.wdrb.com/news/education/auditor-jcps-employees-were-told-not-to-report-seclusion-restraint-incidents/article\\_e22a540a-e53d-52a2-bf6a-34de833ca0d9.html](https://www.wdrb.com/news/education/auditor-jcps-employees-were-told-not-to-report-seclusion-restraint-incidents/article_e22a540a-e53d-52a2-bf6a-34de833ca0d9.html) [https://perma.cc/G2NQ-ZYUH]; Kara Kenney, *CALL 6: School Districts Misreport Seclusion, Restraint Incidents*, *WRTV INDIANAPOLIS* (Oct. 10, 2016), <https://www.wrtv.com/news/call-6-investigators/call-6-school-districts-misreport-seclusion-restraint-incidents>.

193. *See, e.g.*, Jenny Abamu & Rob Manning, *Desperation and Broken Trust when Schools Restrain Students or Lock Them in Rooms*, NPR (June 5, 2019), <https://www.npr.org/2019/06/05/726519409/desperation-and-broken-trust-when-schools-restrain-students-or-lock-them-in-room> [https://perma.cc/7RRQ-QK5K]; Rob Manning, *NW Parents Challenge Schools' Handling of Students with Disabilities*, *OR. PUB. BROAD.* (Mar. 18, 2019),

The majority of states currently require parents and/or guardians to be notified if their student is physically restrained.<sup>194</sup>

## VI. CONCLUSION

Though it has long been settled that the constitutional rights of students are not coextensive to the rights of adults in other settings, the Supreme Court of Missouri's recent decision, *State ex rel. Alsup v. Kanatzar*, demonstrated this distinction in a tragic yet powerful way. By extending official immunity to a school official who quite possibly erred in executing a physical restraint technique and ultimately broke a student's arm, *State ex rel. Alsup v. Kanatzar* significantly narrowed the protection and recourse available to Mariano and other similarly situated students. But this case was not decided in a vacuum. Rather, it parallels the state government's lack of protection for students due to relatively weak laws and non-binding administrative guidance on the use of physical restraint. Missouri's approach to the physical restraint of students is out of line with the majority of states as well as the federal government. The present reality is not lost on Missouri state legislators, some of whom have proposed legislation that would limit the circumstances in which physical restraint could be used, mandate data reporting, and better engage parents and guardians. While this Note offers several proposals for strengthening student protections, many of which are included in the proposed legislation, the overarching message is that something must be done at the state and local level. Each and every time a student is physically restrained by a school official, both parties are at risk of physical harm and psychological trauma. The seriousness of this behavioral technique, which is properly understood as a means of last resort, necessitates some form of government regulation. The safety of public schools, students, and education professionals is at stake.

---

<https://www.opb.org/news/article/school-discipline-students-special-needs-restraints-washington-oregon/> [https://perma.cc/Y5HY-FMX8].

194. Butler, *supra* note 10, at 87. These states include Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland (unless otherwise stated in the student's IEP/BIP), Massachusetts, Michigan, Mississippi, New Hampshire, New Mexico, North Carolina (but notification is not required in a number of circumstances), Ohio, Oregon, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *Id.*